

FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2018] FCA 1835

Appeal from: *Singh v Minister for Immigration and Border Protection*
[2018] FCCA 1454

File number(s): NSD 1242 of 2018

Judge(s): **FARRELL J**

Date of judgment: 23 November 2018

Catchwords: **MIGRATION** – appeal from the Federal Circuit Court of Australia – partner visa – appellant found not to be genuine spouse of the sponsor – information subject to certificates issued under s 375A of the *Migration Act 1958* (Cth) – Tribunal refused request by appellant’s authorised recipient to extend time to comment on the information – whether the disclosure of the material under s 359A of the *Migration Act* was sufficient – whether the Tribunal fell into jurisdictional error by refusing to extend time to respond to adverse information – appeal dismissed

Legislation: *Migration Act 1958* (Cth) ss 359A, 362A, 369B, 375A, 379C, 379G, 438
Federal Circuit Court Rules 2001 (Cth) r 44.12
Migration Regulations 1994 (Cth) Sch 2 subcl 100.221, reg 4.17
Explanatory Memorandum to the Migration Legislation Amendment Bill (No 1) 2014 (Cth)

Cases cited: *CEF15 v Minister for Immigration and Border Protection*
[2018] FCCA 656
Minister for Immigration and Border Protection v CQZ15
(2017) 253 FCR 1; [2017] FCAFC 194
Minister for Immigration and Border Protection v Singh
(2016) 244 FCR 305; [2016] FCAFC 183
Minister for Immigration and Citizenship v Li (2013) 249

CLR 332; [2013] HCA 18

Minister for Immigration and Citizenship v SZGUR (2011)
241 CLR 594; [2011] HCA 1

MZAFZ v Minister for Immigration and Border Protection
(2016) 243 FCR 1; [2016] FCA 1081

Singh v Minister for Immigration and Border Protection
[2015] FCCA 533

Singh v Minister for Immigration and Border Protection
[2018] FCCA 1454

*WAEF v Minister for Immigration and Multicultural and
Indigenous Affairs* (2003) 236 FCR 593; [2003] FCAFC
184

Date of hearing:	8 November 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	68
Counsel for the Appellant:	The Appellant appeared in person with the assistance of an interpreter
Counsel for the First Respondent:	Mr N Swan
Solicitor for the First Respondent:	MinterEllison
Counsel for the Second Respondent:	The Second Respondent submitted save as to costs

ORDERS

NSD 1242 of 2018

BETWEEN: **SANJAY SINGH**
 Appellant

AND: **MINISTER FOR HOME AFFAIRS**
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **FARRELL J**

DATE OF ORDER: **23 NOVEMBER 2018**

THE COURT ORDERS THAT:

1. 1. The appeal is dismissed.
2. 2. The appellant must pay the Minister's costs as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

FARRELL J

1 This is an appeal from a decision of the Federal Circuit Court of Australia: *Singh v Minister for Immigration and Border Protection* [2018] FCCA 1454. The primary judge dismissed an application for judicial review of a decision of the Administrative Appeals Tribunal made on 20 June 2017.

BACKGROUND

2 The appellant, Mr Singh, is a citizen of Fiji. He married the **sponsor**, an Australian citizen, on 4 October 2003 in Sydney.

3 On 4 August 2008, Mr Singh made a combined application for a Partner (Provisional) (Class UF)(Subclass 309) visa (a **temporary partner visa**) and a Partner (Migrant)(Class BC)(subclass 100) visa (a **permanent partner visa**). He was granted a temporary partner visa on 9 May 2009.

4 On 19 September 2011, in connection with the assessment of his application for a permanent partner visa, the **Department** of Immigration and Citizenship (now known as the Department of Home Affairs) wrote to Mr Singh providing him an opportunity to provide evidence having regard to the advice that the delegate was not satisfied that he and the sponsor were in a genuine and continuing relationship. This was based on a home visit which the Department conducted at an address in the Sydney suburb of Canterbury on 12 July 2011, when Mr Singh and the sponsor were not present. During the visit, the sponsor's daughter denied any knowledge of Mr Singh and stated that her mother was not married and nor was she currently involved in a relationship to the best of the daughter's knowledge. It was also based on identified inconsistencies in evidence given by Mr Singh and the sponsor at an interview conducted on 16 August 2011.

5 On 13 October 2011, Mr Singh signed a form appointing Toufic Laba Sarkis as his authorised recipient. The Department received the form on 17 October 2011 together with a letter from Mr Laba Sarkis supporting Mr Singh's application and Mr Singh's handwritten response to the Department's letter. In it, Mr Singh said that on the day of the Department's visit he had had a problem with the sponsor's daughter which is why she said what she did. He also addressed some other details in relation to which there were discrepancies, including

that he had gone to stay in Blacktown with his brother because of difficulties with the sponsor's daughter.

6 6 On 21 October 2011, the Department wrote to Mr Singh saying that the form appointing an authorised contact had not been completed correctly and requested a new one. On 7 November 2011, Mr Laba Sarkis returned a new form signed by Mr Singh on 3 November 2011. The response to question 11 – Have you appointed a migration agent or exempt person to provide you with immigration assistance – was ticked “No”.

7 7 The delegate refused to grant Mr Singh a permanent partner visa on 20 January 2012. Mr Singh sought review by the Migration Review Tribunal (**MRT**). Following a hearing on 19 December 2013 at which Mr Singh and the sponsor gave evidence, on 3 January 2014 the MRT wrote to Mr Singh under s 359A of the *Migration Act 1958* (Cth) putting to him the information provided by the sponsor's daughter during the home visit and identified inconsistencies in evidence given by Mr Singh and the sponsor in interviews with the delegate and the MRT. Mr Singh responded on 14 February 2014. In the letter Mr Singh said (among other things) that the sponsor's daughter had been nervous during the home visit and confused by the serious questions, but she had given a statutory declaration which supported his application (AB201-202 indicates that that statutory declaration was made on 4 June 2011). He requested copies of all his documents.

8 8 The MRT did not accept that Mr Singh and the sponsor were in a “genuine and continuing relationship” and affirmed the delegate's decision on 6 March 2014. On 18 March 2015, the Federal Circuit Court made orders remitting the matter for redetermination according to law on the basis that Mr Singh's request for documents was not met and therefore the Tribunal's procedural fairness obligations were not met: see *Singh v Minister for Immigration and Border Protection* [2015] FCCA 533.

9 9 Following the remittal to the Administrative Appeals **Tribunal** (the MRT having been subsumed into the Tribunal by that time), on 16 February 2016, Mr Singh re-appointed Mr Laba Sarkis as his authorised recipient. Mr Singh ticked the box “I appoint the person whose details are provided below to act as my authorised recipient. I do not wish to appoint this person as my representative”. He ticked another box “yes”, which indicated that he agreed to the Tribunal sending all correspondence by email. He completed a further box as follows:

My ~~representative~~/authorised recipient is (tick one box only):

- ☐ a migration agent ☐ my spouse, parent, child, brother or sister
- ☐ the sponsor/nominator of the visa applicant ☒ Other (please specify)
COMMUNITY VOLUNTEER

10 10 By a letter dated 8 August 2016, the Tribunal invited Mr Singh to attend a hearing on 9 November 2016 and indicated that the Tribunal member may also wish to take evidence from his sponsor so that Mr Singh should arrange for her to attend the hearing as well. In the second paragraph of the letter, the Tribunal said:

We have considered the material before us but we are unable to make a favourable decision on this information alone.

11 11 On 3 November 2016, Mr Singh wrote to the Tribunal stating that he knew that the Tribunal was inviting him to a hearing but he and the sponsor “have been hurt” by the last hearing and are “not happy to attend another hearing and for that reason we ask that the Tribunal consider the application based on the previous evidence and evidence on file”. He went on to say that he and the sponsor “are emotionally down because of what happened during the first interview”. He asked the Tribunal to “give me any information in writing to reply to you because we went through hard time before and we do not wish to go again through the same tough procedures”. That letter is marked as received by the Tribunal on 7 November 2016. It appears at AB389.

12 12 By a letter dated 7 November 2016 sent to Mr Laba Sarkis, the Tribunal advised Mr Singh that the hearing on 9 November 2016 was being postponed because, “due to circumstances beyond our control the Member is unable to conduct the hearing on that day”. The Tribunal expressed regret for any inconvenience caused and said that it would advise as soon as a new hearing date was available.

13 13 On 17 November 2016, the Tribunal wrote to Mr Laba Sarkis for Mr Singh in relation to a request received on 7 November 2016 for access to written material related to the application for review. Access was granted except for folios 86, 63 and 57 on the basis that disclosure was excluded under Australian Privacy Principles as they “contain personal information about another person”, folios 121-122 because they were subject to a certificate under s 375A of the *Migration Act* which certified that disclosure would be contrary to the

public interest; and folios 66-68 and 73-75 because they also were subject to a certificate under s 375A.

14 14 On 21 November 2016, the Tribunal wrote to Mr Laba Sarkis inviting Mr Singh to comment on the following information:

(1) (1) In November 2008, the Australian High Commission in Suva received an allegation that Mr Singh had promised to marry a girl, took her to a hotel for sex and subsequently did not answer her telephone call. It was also alleged that he was “playing around” with other girls. That information might lead the Tribunal to find that the relationship between Mr Singh and the sponsor was not, at that time, a genuine and continuing relationship and it might undermine his claim that he is currently in a spousal relationship.

(2) (2) In his request for fee waiver/reduction application to the Tribunal dated 17 February 2012 he did not list dependants, including the sponsor and her minor children. That information was relevant because it might lead the Tribunal to find Mr Singh and his sponsor were not living together so that the relationship between them was not genuine and continuing and it may reflect on their credibility.

15 15 The Tribunal’s letter requested a response by 5 December 2016. It also advised Mr Singh as follows (as written):

We note that your letter dated 3 November 2016 in which you state you and your partner are not happy to attend another hearing and therefore request the Tribunal consider the application based on the previous evidence and evidence on the file.

The Tribunal reiterates that it has considered the material before it but is unable to make a favourable decision on this information alone. Please confirm whether you do not wish to attend a hearing.

16 16 By an undated letter received by the Department on 15 December 2016, Mr Singh denied the allegation set out in [14(1)] above and requested a copy of the information and his application for fee waiver. This letter is set out at AB404.

17 17 A file note dated 6 January 2017 indicates that an officer contacted Mr Singh by telephone and:

- (3) (1) He explained that the Tribunal could not provide the information in relation to the 2008 allegation received by the Australian High Commission because it is “non-disclosable”.
- (4) (2) He undertook to send a copy of the fee waiver request.
- (5) (3) He enquired of Mr Singh whether he would like the Tribunal to schedule a hearing or make the decision on the papers. Mr Singh said he would like the decision made on the papers. Mr Singh was asked to put that in writing. Mr Singh was advised that the letter should be signed by him, not his “ar”, which I take to mean authorised recipient.
- (6) (4) In response to an enquiry if he needed further time to submit documents, Mr Singh asked for two weeks. The officer told Mr Singh that they must be submitted by close of business on 20 January 2017 and after that the Tribunal would proceed to make a decision.

18 18 By a letter dated 7 January 2017 from Mr Singh to the officer (which appears at AB406), Mr Singh again denied the “false allegation” and said that he did not request a copy of the fee waiver but a copy of the allegation. He went on to say:

As I told you I expect the Tribunal to put any adverse information or any further questions to me so that I will respond to it because I believe that the Tribunal has no adverse information against me and my wife unless you have something in writing which I request.

19 19 In a file note of a conversation between the officer and Mr Singh dated 11 January 2017, the officer reported that:

- (7) (1) He asked Mr Singh who wrote the letter dated 7 January 2017 because it did not make sense in terms of the conversation on 6 January 2017. Mr Singh said that Mr Laba Sarkis wrote the letter because Mr Singh’s English is “not that good”. The officer informed him that Mr Laba Sarkis is not a migration agent and should not be providing migration assistance.
- (8) (2) He asked Mr Singh if he understood the conversation on 6 January 2017 and he said that he did.

The file note then states (as written):

I told the applicant he needs to write to the Tribunal (not his AR) how he would like

to proceed. He said he wants the Member to make the decision on the papers and he does not want a further hearing. I said he needs to be put in writing. He said he will do this by the end of the week.

As per previous conversation I told the applicant the Member has agreed to wait until close of business 20 January 2017 before a decision is made. The applicant understood.

20 20 A further file note dated 11 January 2017 states (as written):

The AR called and said the applicant did not understand the conversation he had with me earlier this morning. I told the AR that I could not discuss with him the applicant's case as he is only a AR and not his rep. I told the AR that the applicant assured me he understood everything I told me earlier, however I am more than happy to repeat it to him again.

I told the AR to get the applicant to call me either before 5 pm today or first thing tomorrow morning and I will repeat to him the member's instructions. I said if the applicant wanted I could use an interpreter. The AR said he does not need an interpreter.

21 21 A file note dated 12 January 2017 indicates that the officer again spoke with Mr Singh. Mr Singh asked if there was a form that he needed to complete about how he would like the Tribunal to proceed and he was told to send an email or write on a piece of paper exactly how he wants the Tribunal to proceed. The officer reported his conversation with Mr Laba Sarkis and, in response to a question from the officer, Mr Singh said that he understood everything and that he would fax something through soon.

22 22 By a letter dated 12 January 2017 addressed to the officer, Mr Singh advised that, "further to our telephone conversation" he asked the Tribunal "to make a decision without interview based on the information already available to the Tribunal". He concluded (as written):

I still appreciate if the Tribunal can write to me and tell me of any adverse material and any further information required.

23 23 By a letter dated 19 January 2017 sent to Mr Laba Sarkis, the Tribunal invited Mr Singh to attend a hearing on 10 March 2017. The letter advised that the Tribunal may also wish to take evidence from the sponsor and for Mr Singh to arrange for her to attend the hearing.

24 24 Mr Singh signed a response to hearing invitation form which had been included with the Tribunal's letter of invitation. It is dated 24 January 2017. In it, he advised that he and the sponsor would not attend the hearing.

25 25 In a file note dated 21 April 2017, an officer of the Tribunal notes that she spoke with Mr Laba Sarkis who enquired about the status of the matter. It was explained that no decision had yet been made. On the same day, a return call was made to Mr Laba Sarkis informing him that Mr Singh's request to have the matter determined on the papers had been referred to the presiding member who was still working towards a decision. No definitive time frame would be given but the query would be brought to the presiding member's attention.

26 26 On 31 May 2017, a letter was sent by email to Mr Laba Sarkis for Mr Singh. It contained an invitation to Mr Singh to respond by 14 June 2017. The letter noted that the Department's files contained three certificates under s 375A which related to information identifying third parties who provided adverse information to the Department giving rise to privacy and confidentiality obligations. The Tribunal was satisfied that each certificate was validly issued:

(9) (1) The first certificate related to folio 140. The letter advised that the information covered by the certificate had been put to Mr Singh under s 359A in its letter dated 21 November 2016 and that he responded to it by an undated letter received by the Tribunal on 15 December 2016. As to this, see [16] above.

(10) (2) The second certificate related to folio 138. The Tribunal noted that the Department's home visit was discussed with Mr Singh in the first Tribunal hearing and that it was the subject of the letter sent on 3 January 2014 to which he responded by letter of 14 February 2014. The letter dated 3 January 2014 advised (among other things) that the Department's file contained a statutory declaration from the sponsor's daughter dated 4 May 2011 attesting to the relationship between Mr Singh and the sponsor, but during a home visit by the Department on 12 July 2011, the daughter denied any knowledge about Mr Singh and considered that her mother was single.

(11) (3) The third certificate related to information "in an accompanying s 359A letter".

27 27 The accompanying letter was also dated 31 May 2017. It advised that on 18 November 2016 the Tribunal had received information from an anonymous source that Mr Singh was married but not living with his wife and that his wife lives in Canterbury while

Mr Singh lived in Campsie with his girlfriend who had recently arrived from Fiji. The letter advised that comments or response should be received by 14 June 2017. The letter advised that if Mr Singh could not provide comments or response by that date, the Tribunal would “carefully consider” any request for an extension, but that if comments or response were not received “we may make a decision on the review without taking any further action to obtain your views on the information” and he would lose any entitlement he might have under the *Migration Act* to appear to give evidence and present arguments.

28 28 On 1 June 2017, Mr Laba Sarkis advised the Tribunal by email as follows:

Thank you for your email. I regret to inform you that I have not been able to get in touch with Sanjay Singh. I forwarded your email to his home address by mail as I will be flying to Vietnam tomorrow 2 June. I will not be back until Saturday 17 June therefore I appreciate if further extension till the end of June be granted to enable me to talk to Sanjay and pass on the information to him.

29 29 On 14 June 2017, a letter was sent by email to Mr Laba Sarkis for Mr Singh. In it, the Tribunal advised that it had received a request for an extension of time on 2 June 2017 but the request was refused and any comment or response must be received by 14 June 2017 or a decision on the review may be taken without further action to obtain Mr Singh’s views.

30 30 On 14 June 2017, Mr Laba Sarkis sent an email to the Tribunal as follows (as written):

Thank you for your email. I have still been unable to reach sanjay Singh.

As a matter of natural justice and fairness I request that you consider an extension of time until 24 June 2017 as I am returning to Sydney on Saturday 17 June 2017 and hope to be able to contact him by then.

The Tribunal responded shortly after on the same day:

Please be advised that the member has considered your request carefully but has decided not to grant an extension of time.

A response should be received by the tribunal by 14 June 2017.

31 31 By a letter dated 21 June 2017 sent to Mr Laba Sarkis, the Tribunal advised Mr Singh that it had decided to affirm the delegate’s decision and provided a copy of the **decision record** (or **DR**) dated 20 June 2017.

THE PROCEEDINGS IN THE FEDERAL CIRCUIT COURT

- 32 32 Mr Singh's grounds of review in the Federal Circuit Court were (as written):
1. The Tribunal had strong evidence about spousal relationship yet failed to take into account any false allegation and the Tribunal failed to show me copies of the allegation.
 2. My authorised recipient requested an extension of time yet the Tribunal denied to give it to me and such is a denial of fairness and justice.
 3. The Tribunal failed to take into account that my wife and I previously gave evidence to the Tribunal and the Tribunal had no basis to place weight on December 16 allegation and the Tribunal was aware that our relationship is a committed one and that I applied on 4 August 2008 and the relationship was accepted by the Overseas Post and that the first refusal by the Tribunal was quashed by Federal Circuit Court of Australia.
 4. The Tribunal's decision is unreasonable and the denial of the request for a further extension is also unreasonable.
- 33 33 On 21 May 2018, a time at which Mr Singh was unrepresented, the primary judge ordered the Minister to show cause under r 44.12(1)(b) of the *Federal Circuit Court Rules 2001* (Cth) as to why relief should not be granted to Mr Singh in relation to the following two issues:
- a. Whether there was sufficient disclosure to the applicant of the contents of the certificates issued under s.375A of the *Migration Act 1958* (Cth) such that the Administrative Appeals Tribunal complied with its obligation to afford the applicant a fair hearing; and
 - b. The role of an applicant's authorised recipient, in the context of the refusal by the Administrative Appeals Tribunal of a request by the applicant's authorised recipient for an extension of time to respond to correspondence.

These are the two issues raised by Mr Singh in his grounds of appeal.

- 34 34 Mr Singh was represented by counsel at the final hearing on those issues.
- 35 35 In addition to the court book, the primary judge had before him an affidavit of Tristan James Dimmock made on 27 April 2018 dealing with three certificates issued under s 375A of the *Migration Act*, which were exhibited in sealed envelopes. The primary judge stated that he had examined that material.
- 36 36 At J[19], the primary judge observed that, while Mr Singh was no longer directly attacking the certificates in issue, he contended that the Tribunal fell into error in its refusal to extend time for comment on the three certificates referred to in the correspondence on

31 May 2017. This was because the Tribunal knew that he required the assistance of Mr Laba Sarkis to deal with the documents in the English language, it knew that Mr Laba Sarkis was unavailable during the period for comment and it knew that Mr Singh did not wish to attend a further Tribunal hearing and was therefore reliant on documents before the Tribunal.

37 37 At J[20], the primary judge set out how the Tribunal dealt with those circumstances at [17]-[18] of its decision record as follows:

On 1 June 2017, the applicant's authorised recipient, Mr Laba Sarkis informed the Tribunal that he could not contact the applicant but had forwarded the correspondence from the Tribunal on to the applicant's home address. Mr Sarkis further stated that he was travelling overseas from 2 June 2017 and would return on 17 June 2017 and requested an extension of time to respond [to] the correspondence so that he could discuss the matter with the applicant. On 14 June 2017, the Tribunal declined Mr Sarkis' request. A further request was made for an extension of time, which was once again refused. The Tribunal notes that Mr Sarkis is the applicant's authorised recipient and not the applicant's representative.

Furthermore, the Tribunal notes that the Departmental files contain three certificates under s.375A of the Migration Act. On 31 May 2017, the Tribunal wrote to the applicant informing him of the existence of these certificates and that it was satisfied that the certificates were valid as the material contained in the certificates related, amongst other things, to third parties, giving rise to privacy and confidentiality obligations. The Tribunal further notes that information protected by these certificates has been put to the applicant either at the previous Tribunal hearing or under s.359A of the Migration Act.

38 38 The primary judge proceeded on the basis that the three certificates were validly issued consistently with his reasoning in *CEF15 v Minister for Immigration and Border Protection* [2018] FCCA 656 and therefore found that the Tribunal was correct in finding that the certificates were valid and acted in accordance with its duty to disclose so much of the material covered by the certificate as was required and appropriate under s 359A of the *Migration Act*: J[22]-[23].

39 39 The primary judge noted (without demur) the Minister's submission that the relevant material covered by the first two certificates had previously been disclosed to Mr Singh either at the first Tribunal hearing or by letter pursuant to s 359A and that Mr Singh had also been granted access to the Minister's Department's files pursuant to s 362A of the *Migration Act*, following the earlier Federal Circuit Court decision.

40 40 In relation to the Tribunal's assessment of Mr Laba Sarkis' role as being limited to receiving documents, not the provision of advice to Mr Singh, the primary judge found that

there was support for that approach in s 379G(1) of the *Migration Act* pursuant to which the Tribunal's obligation is limited to communicating to an authorised representative, not receiving material from the authorised representative. His Honour went on to quote as follows from the *Explanatory Memorandum to the Migration Legislation Amendment Bill (No 1) 2014* (Cth), in relation to the inclusion of s 379G in the *Migration Act* as follows:

This amendment clarifies that the role of an authorised recipient is merely to receive documents on behalf of the applicant in connection with the review, as the current provision in subsection 379G(1) is broader than the intended policy position. The amendment also addresses comments made by the Full Federal Court in *MZZDJ v Minister for Immigration and Border Protection* [2013] FCAFC 156, at paragraph 35, in relation to the similarly worded section 494D of the Act, that an authorised recipient is "constituted effectively as the agent of the visa applicant" because the provision allows the authorised recipient to "do things on behalf of" the applicant. This is broader than the policy intention for the role of an authorised recipient, which is only to receive documents and not to do anything else on behalf of the applicant or person.

41 41 The primary judge accepted the Minister's submission that the Tribunal's refusal to extend time to respond to the letters dated 31 May 2017 fell within the area of its decisional freedom in the circumstances of the case, noting that Mr Singh's refusal to participate in a further Tribunal hearing could have supported either a decision to extend time or to refuse to do so. His Honour found that Mr Singh's limited English was a factor which supported an extension of time, but noted that Mr Singh was not limited to the services of Mr Laba Sarkis. His Honour noted the fact that the Tribunal sent its notification of refusal to extend time on the last day for comment and that had the effect of limiting the possible responses from Mr Laba Sarkis. His Honour also noted that Mr Laba Sarkis was "no stranger to Tribunal proceedings" and found that Mr Laba Sarkis would have known (and could have told Mr Singh) that any material given to the Tribunal before it made its decision would be taken into account. In fact, the Tribunal did not make its decision until 20 June 2017. His Honour found that Mr Singh could be taken to already be acquainted with the adverse information which was the subject of the first two certificates and could reasonably have been expected to respond to the information covered by the third certificate.

First ground

42 42 The primary judge rejected the first ground of the application for review to the extent that it sought impermissible merits review. I take that to be a reference to the contention that there was "strong evidence" about the spousal relationship. His Honour found that the

Tribunal correctly interpreted subcl 100.221(2) of Sch 2 of the *Migration Regulations 1994* (Cth) and made findings that were open to it. The primary judge noted that the Tribunal made specific references to the material provided by Mr Singh and it noted that he had not provided “recent independent evidence” corroborating the relationship.

43 43 His Honour moved on to address the complaint that the “false allegations” had not been shown to Mr Singh. I infer that that is what his Honour was doing when he considered the material subject to certificates issued under s 375A of the *Migration Act*. His Honour noted that the first certificate related to an allegation from a third party about Mr Singh’s conduct; that was the information received by the Australian High Commission. His Honour noted that the second certificate covers the Department’s home visit in 2011 (when the sponsor’s daughter stated she did not know Mr Singh and that the sponsor was single) and passenger cards. The third certificate covers information from a third party indicating that the Mr Singh’s relationship with the sponsor was not genuine.

44 44 His Honour noted that in this matter, the Tribunal had expressly disclosed the existence of the three certificates, it found that the certificates were validly issued on the basis (among other things) of confidentiality and privacy obligations to third parties and the information covered by the material had been put to Mr Singh for comment under s 359A in letters dated 21 November 2016, 3 January 2014 and 31 May 2017 (and the gist of some of the material had been put to him in the MRT hearing). His Honour found that this distinguished the matter from the decisions in *MZAFZ v Minister for Immigration and Border Protection* (2016) 243 FCR 1; [2016] FCA 1081 and *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305; [2016] FCAFC 183 in which certificates issued under ss 438 and 375A of the *Migration Act* respectively had not been disclosed and that was found to have been procedurally unfair. The primary judge found that, in these circumstances, the Tribunal discharged its procedural fairness obligations and there is no basis on which Mr Singh could be found to have suffered practical injustice.

Second ground

45 45 His Honour found that the Tribunal’s refusal to extend time for Mr Singh to respond to its letters of 31 May 2017 did not lack an “evident and intelligible justification” because it had been refused on the basis that Mr Laba Sarkis was not Mr Singh’s representative.

Third ground

46 46 Insofar as the third ground contended that the Tribunal “failed to take into account” evidence previously provided in support of the relationship, the primary judge found that the Tribunal was not required to refer to every piece of evidence, relying on *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1 and *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593; [2003] FCAFC 184. Further, the Tribunal made specific reference to material provided by Mr Singh. Relevant to its findings, the Tribunal correctly noted that Mr Singh had not provided “recent independent evidence” corroborating the relationship.

47 47 The primary judge noted that the Tribunal did (at DR[27]) place weight on the “December 16 allegation” that the parties are not living together and Mr Singh has a girlfriend recently arrived from Fiji, but contrary to the allegation in the ground, it was open to the Tribunal to do so in its fact finding task and the Tribunal complied with its procedural fairness obligations in relation to that allegation by the letter dated 31 May 2017.

48 48 The primary judge also found that it was not relevant to the Tribunal’s decision or the application to the Federal Circuit Court that Mr Singh had been granted a temporary partner visa and the Federal Circuit Court remitted the MRT’s decision for reconsideration. His Honour noted that the error identified by the Federal Circuit Court had been remedied when Mr Singh was given the Department and Tribunal files on 17 November 2016 and when the Tribunal complied with its procedural fairness obligations in relation to the substance of the information covered by the certificates.

Fourth ground

49 49 In relation to the question of whether the Tribunal’s decision and the refusal to grant an extension of time in response to Mr Laba Sarkis’ request to do so was “unreasonable”, the primary judge found that, as set out in relation to grounds one and two, the Tribunal correctly interpreted and applied the requirements of subcl 100.221(2) and made findings that were open to it and its reasons for refusing Mr Sarkis’ request did not lack an “evidence and intelligible justification”.

50 50 The primary judge found that Mr Singh had failed to demonstrate that the Tribunal’s decision was affected by jurisdictional error and accordingly dismissed the application.

GROUND OF APPEAL

51 51 Mr Singh relies on two grounds of appeal from the primary judge's decision:

Grounds of appeal

1. His Honour failed to accept that the disclosure of adverse information is affected by error of law as it was not a full disclosure.
2. The Tribunal denied procedural fairness to me by not extending the time.

52 52 Mr Singh was not legally represented at the hearing of the appeal. He did not file written submissions in accordance with the timetable set down for preparation of the appeal. Instead, he handed up written submissions at the hearing and made brief oral submissions. The matters raised in the submissions were not confined to Mr Singh's grounds of appeal.

53 53 The Minister's representative filed written submissions and appeared by counsel.

54 54 The proceedings were conducted with the assistance of an interpreter.

First ground

55 55 In his written submissions, Mr Singh noted that the Tribunal "placed weight" on adverse information, especially the sponsor's daughter's denial of a relationship between Mr Singh and the sponsor during the home visit in July 2011. He invited the Court to take into account pages 404, 406 and 389 of the appeal book, which are the letters which he wrote to the Tribunal on 3 November 2016 and 7 January 2017 and the undated letter received by the Tribunal on 15 December 2016, each of which are referred to in the "Background" set out above. In those letters, Mr Singh denied the allegation made to the Australian High Commission in Fiji and addressed why he did not list the sponsor and dependents on his application for a fee waiver.

56 56 In his written submissions, Mr Singh noted "my stepdaughter" had previously given a statutory declaration "in her own writing" which appears at AB201/202 and he states that she "got confused" and that "there is no evidence that the Officer spoke to her". In concluding his submissions, Mr Singh states that he believes that the Tribunal was unfair in refusing his application and that he replied to all adverse information in writing, stating the "Court Book is thick enough and has enough evidence about our relationship".

57 57 As noted by the Minister, the Tribunal expressly advised Mr Singh of the three certificates which addressed the complaint to the Australian High Commission in Fiji, the

July 2011 home visit and the allegation made in late 2016 that Mr Singh and the sponsor did not have a genuine relationship and that he was living with a girlfriend recently arrived from Fiji. It advised him that in its view, the certificates were valid because of confidentiality and privacy obligations owed to third parties. Based on the annexures to Mr Dimmock's affidavit and the letter from the Tribunal dated 31 May 2017, the adverse information was fairly disclosed to Mr Singh. The Tribunal's opinion as to the validity of the certificates was open to it for the reasons that it gave.

58 58 Mr Singh was invited to comment on the first two issues on several occasions and did in fact do so. The letters dated 31 May 2017 allowed 14 days for response as required by s 359B(2) of the *Migration Act* and reg 4.17(4) of the *Migration Regulations*. The letters were given to his authorised recipient as required by s 379G(1) by email at the last email address provided and they are taken to have been received at the end of the same day (s 379C(5)). It is clear from Mr Laba Sarkis' email of 1 June 2017 that he sent the 31 May 2017 letters by mail to Mr Singh's residential address. This is the procedure for notification prescribed by the legislation so that, according to those procedures, Mr Singh was given an opportunity to comment on all three issues.

59 59 While Mr Singh disputes the adverse information, it was open to the Tribunal to "place weight" on that material and, in the case of the July 2011 home visit, to reject Mr Singh's explanation that he had problems with the sponsor's daughter and that he went to his brother's home in Blacktown as a result. As observed by the primary judge, fact finding is the Tribunal's task. The finding did not lack a logical basis having regard to the inconsistencies in evidence given by Mr Singh and his sponsor to the Department and the MRT.

60 60 In my view, having regard to the Full Court's decision in *Minister for Immigration and Border Protection v CQZ15* (2017) 253 FCR 1; [2017] FCAFC 194, there is no error in the primary judge's approach to this issue or in his finding that the Tribunal discharged its procedural fairness obligations with respect to disclosure of adverse information for the reasons that his Honour gave.

Second ground

61 61 The primary focus of Mr Singh's written submissions was that the primary judge erred by not accepting that the Tribunal was unfair and unreasonable in refusing Mr Laba Sarkis' request for an extension of time. At the hearing, Mr Singh said that he was in Fiji at

the time and he asked Mr Laba Sarkis to act on his behalf in replying to the Tribunal about an extension of time. However, as the Minister's counsel correctly pointed out, the question of whether the Tribunal's decision to refuse the extension of time was reasonable must depend on the material before it at the time the decision was made. There is nothing in Mr Laba Sarkis' communications with the Tribunal that indicate that Mr Singh was not in Australia at any time in the period 31 May-14 June 2017. There is no evidence that Mr Singh communicated with the Tribunal or attempted to do so in that period.

62 62 The Minister submitted that the primary judge did not err in finding that the decision to refuse to extend time was within the areas of "decisional freedom" referred to in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [28], particularly in the broader context in which the decision was made. That included:

- (12) (1) Mr Singh expressly declined to attend Tribunal hearings when scheduled;
- (13) (2) Mr Singh made repeated requests for the Tribunal to make its decision on the papers, and as late as 12 January 2017 requested it to proceed to do so;
- (14) (3) Mr Singh was on notice of the substance of the material covered by the certificates and had provided responses to that information, at least in relation to the material covered by the first two certificates;
- (15) (4) The Tribunal's decision was not, in fact, made until 20 June 2017, which was after the date that Mr Laba Sarkis had told the Tribunal that he would return from overseas (being 17 June 2017); and
- (16) (5) The effect of s 379G(1)(b) is that an authorised recipient has no statutory entitlement to do anything more than receive documents and Mr Laba Sarkis advised that he had forwarded the Tribunal's correspondence to Mr Singh's home address on 1 June 2017 and the Tribunal was therefore entitled to take the view that he had received it.

63 63 In my view, the primary judge was correct to say that in the circumstances, the Tribunal might have made the decision either to grant an extension or refuse one. The fact that Mr Laba Sarkis was to be overseas did not mean that Mr Singh would not be in a position to respond to the Tribunal's 31 May 2017 correspondence. While the fact that Mr Laba Sarkis asserted that Mr Singh has limited comprehension of English assumes some relevance, as is evident from the Appeal Book, Mr Singh corresponded on his own account with the Tribunal on occasions and does not appear to have been inhibited in speaking with

Tribunal officers on the telephone. Having regard to the statutory framework identified above, Mr Laba Sarkis' function was to receive documents and his 1 June 2017 email is evidence that he had fulfilled that function. As noted in the "Background" above, the terms of his appointment made it clear that he was not appointed to act as a representative. Even so, he was in a position to contact the Tribunal after his return to Australia and before the Tribunal made its decision.

64 64 I perceive no error in the primary judge's approach to this issue or in his rejection of this ground.

Other matters

65 65 Mr Singh's oral submissions were that:

(17) (1) The complaint to the Australian High Commission in Fiji referred to Mr Singh as a "citizen" which is not correct; and

(18) (2) The complaint made in late 2016 (that he did not have a genuine relationship with his sponsor and that he was living with a girlfriend recently arrived from Fiji) incorrectly stated that he had a Facebook ID. Mr Singh then said that he did, in fact, create a Facebook ID but his knowledge was so poor that he has not used it.

66 66 In relation to these matters, I accept the Minister's submission that the Tribunal put the adverse substance of these complaints (rather than these details) to Mr Singh for comment.

67 67 I also accept the Minister's submissions in relation to matters raised in Mr Singh's written submissions that:

(19) (1) They are not consistent with the grounds of appeal.

(20) (2) In the first paragraph, Mr Singh states that he disagrees with the Tribunal's findings about financial aspects of the relationship. That is simply an invitation to merits review. In any event, at DR[23], the Tribunal states that it has reviewed material about the parties' finances, including bank statements, and concluded that the parties had no joint ownership of assets, joint liabilities or any joint legal obligations. It cannot be made out that the Tribunal failed to consider possibly relevant evidence in this regard.

- (21) (3) The next two paragraphs refer to the nature of the household and social aspects of the relationship, but these paragraphs merely express factual disagreement with the Tribunal's conclusions.
- (22) (4) The fact that Mr Singh claims that he and the sponsor were hurt by their experience with the MRT as a basis for refusing to attend further hearings discloses no jurisdictional error by the Tribunal. Accordingly, the transcript of the MRT proceeding in the Appeal Book is, as the primary judge found, irrelevant. In any event, the Tribunal noted and addressed the fact that Mr Singh and the sponsor declined to attend hearings.
- (23) (5) To the extent that language used in the submission suggests that Mr Singh is sceptical that the Department made the home visit in July 2011, that is inconsistent with responses which he gave to the Tribunal which indicate that the sponsor's daughter misunderstood questions put to her during the visit.

CONCLUSION

68 68 For the foregoing reasons, the grounds of appeal are not made out and the appeal should be dismissed with costs.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell.

Associate

Dated: 23 November 2018